Supreme Court, U.S.
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93-209 (2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SEPARATE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN*
16213 South 35th Street
Phoenix, Arizona 85044
(602) 759-9024

*Petitioner, In Propria Persona

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EDITOR'S NOTE

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A P P E N D I X A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN,	)	No. 91-16625
	)	
	)	D.C. No. CV-91-00452-CAM
Plaintiff-Appellant	)	
	)	
v.	)	
	)	
UNITED STATES,	)	MEMORANDUM *
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States
District Court for the
District of Arizona
C.A. Muecke, District Judge,
-Presiding

Submitted February 11, 1993 **

Before: GOODWIN, SCHROEDER, and CANBY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Blankstyn's request for oral argument.

William C. Blankstyn appeals pro se the district court's dismissal of his action seeking injunctive relief and damages in connection with the Internal Revenue Service's (IRS) levy on his wages to collect taxes assessed against Blankstyn for tax year 1985. Blankstyn also appeals the district court's denial of his Fed. R. Civ. P. 59(e) motion. We have jurisdiction pursuant to 28 U.S.C. §1291. We affirm in part, vacate in part and remand.

I. BACKGROUND

Blankstyn filed a complaint in district court seeking to enjoin the IRS from levying on his wages and seeking damages for wrongful disclosure of return information. Blankstyn alleged that he never received a notice of deficiency for tax year 1985, and that the assessment was not properly made and recorded. Blankstyn alleged that the IRS's collection of taxes assessed for 1985 was therefore unlawful. Blankstyn sought a

temporary restraining order, preliminary injunction, and permanent injunction to prevent IRS from levying on his wages to collect the 1985 tax assessment. Blankstyn also alleged that because the assessment was procedurally improper, the IRS's disclosure of return information in connection with the wage levy violated 26 U.S.C. §7431. Blankstyn sought damages for wrongful disclosure of return information and an injunction to prevent further wrongful disclosures.

On April 19, 1991, the district court held a hearing on plaintiff's request for a preliminary injunction. At the conclusion of the hearing, the district court issued a preliminary injunction effective for 10 days and ordered supplemental briefing. On April 30, 1991, the district court issued an order (1) consolidating the motion for preliminary injunction with the trial on the merits, (2) treating the motion for preliminary injunction as a motion for permanent injunction,

(3) denying the injunction, (4) granting judgment for the United States, and (5) dismissing the action.

II. Injunction

The district court found that Blankstyn claim for injunctive relief was barred by the Anti-Injunction Act ("Act"), 26 U.S.C. §7421(a). The Act prohibits a taxpayer from bringing a "suit for the purpose of restraining the assessment or collection of any tax ...." Id. The Act is strictly enforced. See Maxfield v. United States Postal Serv., 752 F.2d 433, 434 (9th Cir. 1984); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 736-37 (1974). Thus, ordinarily taxpayers are limited in district court "to suits for refund." United States v. Condo, 782 F.,2d 1502, 1506 (9th Cir. 1986).

There are several statutory exceptions and one judicial exception to the Act. See 26 U.S.C. §§6212(a), (c), 6213(a), 6672(b),

6694(c), 7426(a),(b)(1), 7429(b); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). Under the judicial exception announced in Enochs, injunctive relief is available if the taxpayer can demonstrate that (1) under no circumstances could the government prevail, and (2) the taxpayer will be irreparably harmed in the injunction is not granted. Id.; see also Condo, 782 F.2d at 1506.

Blankstyn contends that he never received a notice of deficiency for tax year 1985 prior to the assessment and levy, and, therefore, his claim for injunctive relief was permitted by section 6213. This contention lacks merit.

Section 6213 provides that no assessment of a tax shall be made and no proceeding for collection shall begin until 90 days after the mailing of a notice of deficiency pursuant to section 6212. Section 6213 further provides: "[n]otwithstanding the

provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

A notice of deficiency is valid if it is mailed to the taxpayer's last known address, even if it is never received by the taxpayer. Williams v. Commissioner, 935 F.2d 1066, 1067 (9th Cir. 1991); King v. Commissioner, 857 F.2d 676, 679 (9th Cir. 1988); Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982). A postal form certifying that a notice of deficiency has been mailed is sufficient, in the absence of contrary evidence, to establish that the notice was properly mailed. United States v. Zolla, 724 F.2d 808, 810 (9th Cir.) cert. denied, 469 U.S. 830 (1984).

Here, the IRS alleged that it properly mailed Blankstyn a notice of deficiency for tax year 1985. To support this claim, the

IRS submitted (1) a copy of Blankstyn's notice of deficiency for tax year 1985, dated March 26, 1990 and properly addressed to Blankstyn at his last known address, (2) the certified mailing list of notices of deficiency sent by the Ogden Service Center on March 26, 1990 (Form 3624), which listed the certified mail number for Blankstyn's notice, and (3) a copy of the envelope in which the notice was mailed, returned marked "unclaimed" by the post office. Given this evidence, the district court correctly found that the IRS had established that it had properly mailed the notice of deficiency to Blankstyn. See Williams, 935 F.2d at 1067; Zolla, 724 F.2d at 810. Further, the district court correctly found that Blankstyn's claim for injunctive relief under section 6213 was precluded because the notice was properly mailed, regardless of whether Blankstyn ever received it. See Cool Fuel, 685 F.2d at 312.

Blankstyn also contends that he is entitled to injunctive relief under the judicial exception to the Act. This contention lacks merit. Blankstyn failed to establish that under no circumstances could the government prevail. See Enochs, 370 U.S. at 7. Further, Blankstyn has an adequate remedy at law because he can pay the tax and file an action for refund. See 26 U.S.C. §7422. Finally, the district court correctly found that Blankstyn would not suffer irreparable harm without an injunction. See Enochs, 370 U.S. at 7; Elias v. Connett, 908 F.2d 521, 526 (9th Cir. 1990) (financial hardship does not constitute irreparable harm).

III. Wrongful Disclosure

Blankstyn contends the district court erred by consolidating the trial on the merits of his wrongful disclosure claim with the preliminary injunction hearing and dismissing his wrongful disclosure claim.

This contention has merit.

Section 6103 provides that income tax returns and return information are confidential. 26 U.S.C. §6103; Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990). Section 7431 provides a taxpayer a civil cause of action for damages for the intentional or negligent disclosure of confidential return information by officers or employees of the United States. 26 U.S.C. §7431(a); Maisano, 908 F.2d at 410. Section 6103, however, authorizes the IRS to disclose return information if necessary for the collection of a tax liability. 26 U.S.C. §6103(k)(6); see Maisano, 908 F.2d at 410.

Here, Blankstyn alleged that because he did not receive a notice of deficiency and because the assessment was not properly recorded, the underlying assessment and lien were invalid and, therefore, the release of return information was unlawful. The dis-

trict court correctly concluded that the IRS had established that the notice of deficiency was properly mailed and, therefore, that this allegation could not support a wrongful disclosure claim. Nevertheless, the district court failed to address Blankstyn's argument that no assessment was ever made. See 26 U.S.C. § 6203. The only evidence in the record regarding the assessment was a copy of the Summary Record of Assessment, which did not identify Blankstyn or the assessment made against him. Thus, the district court erred by dismissing Blankstyn's wrongful disclosure claim after the preliminary injunction hearing. [1] See Hughes v. United States, 953 F.2d 531, 542 (9th Cir. 1992); Maisano, 908 F.2d at 410. Accordingly, we remand to the district court

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1/ Nevertheless, for the reasons discussed in section II above, Blankstyn was not entitled to injunctive relief on this claim.

for further consideration of this claim. [2]

AFFIRMED in part, VACATED in part and REMANDED.

2/ Given our disposition of this appeal, we need not consider whether the district court erred by denying Blankstyn's Rule 59(e) motion.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN,	)	No. 91-16625
	)	
Plaintiff-Appellant	)	D.C. No. CIV 91-00452-CAM
	)	
v.	)	Arizona (Phoenix)
	)	
UNITED STATES OF AMERICA	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, SCHROEDER, and CANBY, Circuit Judges.

Appellant's motion to consolidate is denied. Appellant's petition for rehearing is denied.

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A P P E N D I X C

In the United States District Court

For the District of Arizona

WILLIAM C. BLANKSTYN Plaintiff vs. UNITED STATES Defendant	)	No. CIV 91-452 PHX CAM ORDER

Having hear the evidence and considered the parties briefs and supplemental briefs concerning Plaintiff's Motion for Preliminary Injunction, the court concludes as follows:

The court heard the evidence presented by the parties. -Therefore, pursuant to R. 65(a)(2), FRCP, this court will order the trial of the action on the merits to be advanced and consolidated with the hearing of the application of preliminary injunction.

FACTUAL BACKGROUND

Plaintiff is challenging a tax assessment for 1985. The IRS is attempting to collect a deficiency allegedly owed by Plaintiff for 1985. Plaintiff claims that the IRS did not properly notice the deficiency and therefore cannot collect. IRS has levied on Plaintiff's wages. Plaintiff alleges that this activity violates 26 U.S.C. §7431 which provides for privacy in return filings.

Plaintiff alleges that had the deficiency been properly noticed he would have filed an appropriate action in the Tax Court. Plaintiff received his 1986 notice and petitioned the Tax Court within the requisite period. He wrote to the IRS and requested information concerning his 1986 notice. The IRS failed to respond to his letter. This, he states, deprives him of his procedural due process rights.

Plaintiff is seeking injunctive relief

to prohibit the IRS from collecting the amounts in violation of the Deficiency Notice requirements and to stop the IRS from disclosing protected information.

The court makes the following findings of fact:

(1) Plaintiff did not receive his 1985 deficiency notice.

(2) The IRS mailed the Notice to Plaintiff.

(3) Plaintiff was aware of the 1985 notice because he requested information concerning the notice. Furthermore, he received the 1986 notice.

(4) The IRS did not respond to Plaintiff's request.

DISCUSSION

Sovereign Immunity

Defendant United States claims that they are protected by the doctrine of sovereign immunity. They argue that the jurisdictional statutes cited by Plaintiff do not provide waiver of sovereign immunity and the

government has not consented to suit. Particularly, Plaintiff cites 26 U.S.C. §§6213 and 7431 which provide for jurisdiction in the federal courts against the United States.[1] Therefore, the sovereign immunity defense fails.

Anti-Injunction Statute

Defendants claim that the Anti-Injunction Statute at 26 U.S.C. §7421 bars relief requested by Plaintiff. The statute specifically excludes §6213(a) from its scope. [2]

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[1] § 6213 provides in relevant part that "Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such a proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court."
§ 7431 the civil damage section provides in relevant part that "such taxpayer may bring a civil action for damages against the United States in a district court of the United States."

[2] 26 U.S.C. §7421 provides in relevant part the following:
(a) Tax.--Except as provided in sections 6212(a) and (c), 6213(a), 7762(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person,

By its language, the statute does not act as a bar to the instant action.

The Injunction

The criteria for an injunction are as follows: (1) irreparable harm, and (2) inadequate remedy at law.[3] The Ninth Circuit uses two tests. Under the Sierra Club test the moving party must show (1) that s/he will suffer irreparable injury if injunctive relief is not granted, (2) probability of success on the merits, (3) in balancing the equities, will the nonmoving party be harmed more by the injunction than the moving party will be helped, (4) that the injunction is in the public interest.[4] The second test provides that the moving party must demonstrate either (1) a

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whether or not such person is the person against whom such tax was assessed.

[3] Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07, 79 S.Ct. 948 (1959).

[4] Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970) aff'd 405 U.S. 727 (1972).

combination of probable success on the merits and the possibility of irreparable injury or (2) that a serious question exists and the balance of hardships tips sharply in his or her favor.[5]

a. Irreparable Harm

The court was presented with Plaintiffs pay stub. The IRS is levying nearly 2/3 of Plaintiff's earnings. However, the court was not presented with the formula by which the IRS determines levy amounts and therefore cannot make a determination of irreparable harm on that basis. Furthermore, the court notes that Plaintiff's lifestyle may be excessive considering his alleged tax debt.[6] Therefore, Plaintiff has failed to show irreparable harm pursuant to Jensen v.

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[5] William Inglis & Sons Baking Co. v. ITT Continental Banking Co., 526 F.2d 86 (9th Cir. 1975).

[6] The court opines that rent of $1,200.00 may be excessive in light of the circumstances.

Internal Revenue Service, 835 F.2d 196 (9th Cir. 1987).

b. Probable Success on the Merits

The court finds that Plaintiff did not receive the Deficiency Notice for 1985 but that the IRS mailed it to his last known address. 26 U.S.C. §6212 authorizes the Secretary to send a deficiency notice by certified mail or registered mail. Notice is required before the Service can begin assessment, collection, etc. U.S. v. Zolla, 724 F.2d 808, cert. denied 105 S.Ct. 116, 469 US 830, reh'g denied 105 S.Ct. 550, 469 US 1067 (9th Cir., 1984). Receipt by the taxpayer is not actually required provided the Notice was sent by certified or registered mail. See e.g., U.S. v. Eisenhardt, 437 F.Supp. 247 (D.Md 1977); Wilson v. Commissioner of Internal Revenue, 564 F.2d 1317, 1319 (9th Cir. 1977); DeWelles v. United States, 378 F.2d 37, 39 (9th Cir. 1967); Cohen v. United States, 297

F.2d 760, 775 (9th Cir. 1962). Morse v. Internal Revenue Service, 635 F.2d 701 (8th Cir. 1980) (Failure to receive did not deny due process). Furthermore, the third circuit has held that failure of the Postal Service to deliver the Notice does not render the notice inadequate. Berger v. C.I.R., 404 F.2d 668 (3rd Cir. 1968), cert. denied, 89 S.Ct. 1744, 395 US 905.

The District Court in Kansas reasoned that "if the IRS had to follow up every unsuccessful mailing to a taxpayer's last know address with further efforts to reach him, the 'obviously impossible' administrative burden that Section 6212(b) and its predecessors were designed to eliminate, see H.R. Rep. No. 2, 70th Cong., 1st Sess., at 22; S.Rep.No.960, 70th Cong., 1st Sess. at 30 would be reimposed, and well-established case law to the effect that Section 6212(b) does not require actual receipt of deficiency notices, [citations

omitted] would be rendered meaningless." Trails End Motels, Inc. v. C.I.R., 532 F.Supp. 85,89 (D.Kan. 1982).

The law is clear that mailing by certified or registered mail is all that is required of the IRS to affect notice.

Would the Tax Court have accepted his petition without Plaintiff Notice of Deficiency? The law is clear that the basis for the Tax Court's jurisdiction is a properly issued Notice of Deficiency. See Richard A. Zaun, 62 T.C. 278 (1974) (in that case the court found that jurisdiction was proper because the petitioner had notice of the deficiency event though he had not received the notice). 26 U.S.C. §6213(a) and Rule 13, Tax Court Rules of Procedure.

However, Plaintiff attached to his supplemental brief a copy of the instructions to file in the tax court. In two places, the instructions remind the petitioner to attach a copy of the Notice of

Deficiency. It is possible from this instruction, any petitioner would thank that he or she need a copy of the Notice of Deficiency to file.

This court finds that Plaintiff received proper notice of the 1985 deficiency. Plaintiff received his 1986 Notice and was expecting the 1985 notice. He inquired by letter concerning the notice which evidences his awareness of the 1985 notice. Although he did not receive a response, he could have filed his petition with the Tax Court. If the notice had not been issued by the IRS the Tax Court would have dismissed the petition for lack of jurisdiction. However, had petitioner filed, the Tax Court would have searched the records and found the Notice of Deficiency and jurisdiction would have been proper.

Based on this finding the court will not order injunctive relief prohibiting further levy of Plaintiff wages.

Money Damages

Plaintiff also seeks money damages under §7431. The court will not award money damages. Money damage awards are appropriate upon a knowing or negligent wrongful disclosure by the IRS. The court finds no such disclosure in this matter.

Plaintiff has a remedy by paying the tax and suing for a refund. Plaintiff could have filed in the Tax Court and stopped the levy. He let that deadline pass even though he was aware of the Deficiency.

For those reasons and the reasons stated by Defendant in its brief and at oral argument IT IS THEREFORE ORDERED THAT:

(1) This hearing for application for preliminary injunction is consolidated and advanced with the trial on the merits treating the motions for preliminary injunctive relief as motions for permanent injunctive relief.

(2) Plaintiff's Motion for Preliminary

Injunction (Doc. 2) is DENIED.

(3) Plaintiff's request for Damages pursuant to 26 U.S.C. §7431 is DENIED.

(4) Plaintiff's Motion for Temporary Restraining Order (Doc.#3-1) is DENIED.

(5) Plaintiff's Motion for Order to Show Cause (Doc.#3-2) is DENIED.

(6) The Clerk of Court shall enter judgment accordingly.

Dated this 30 day of April, 1991.

C.A. Muecke
U.S. District Judge

A P P E N D I X D

In the United States District Court

For the District of Arizona

WILLIAM C. BLANKSTYN Plaintiff vs. UNITED STATES Defendant	)	No. CIV 91-452 PHX CAM ORDER

Having considered the parties' briefs concerning Plaintiff's Motion for a New Trial or in the Alternative Motion to Alter or Amend Judgment, the Court concludes as follows:

On April 30, 1991, this court denied Plaintiff's request for preliminary injunction and dismissed Plaintiff's action against the United States for improper Notice of Deficiency and improper Disclosure of Return Information. At that time, the court deemed the hearing for preliminary injunction as a trial on the merits.

Plaintiff argues that the court's action deeming the preliminary injunction hearing a trial on the merits was improper pursuant to University of Texas v. Camenisch, 451 U.S. 390, 101 S.Ct. 1830 (1981). In dicta in the Camenisch case, the Supreme Court stated that courts have commonly required that the parties receive notice of the court's intent to consolidate the trial and preliminary injunction hearing either before the hearing or at a time which still affords the parties the opportunity to present their cases. Camenisch, 451 U.S. at 395, 101 S.Ct. at 1834. The Ninth Circuit subsequently cited this language in Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988), holding that adequate notice depends on facts of the case and that the district court's broad discretion to consolidate will not be overturned "absent a showing of substantial prejudice in the sense that a party was not allowed to

at 337. The Ninth Circuit further indicated that it has upheld cases in which the district court did not give any notice when the complaining party failed to show how additional evidence could have altered the outcome of the case. Id.

In this case, Plaintiff asserts two additional pieces of evidence not presented at the hearing -- (1) the IRS assessment record and (2) the formula by which IRS determines levy amounts. Neither piece of evidence would change the court's finding that the IRS properly sent notice to Plaintiff. Even if Plaintiff were allowed to present this evidence, the evidence would not alter the outcome of this case. Thus, Plaintiff's argument that he failed to receive adequate notice of consolidation is without merit.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiff's Motion for New Trial (Doc 16-1) is DENIED.

16-1) is DENIED.

(2) Plaintiff's Motion to Alter or Amend Judgment (Doc. 16-2) is DENIED.

(3) The hearing scheduled for August 16, 1991 is VACATED.

Dated this 23 day of July, 1991.

_____

C.A. Muecke
U.S. District Judge

A P P E N D I X E

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WILLIAM C. BLANKSTYN	)	
	)	
Plaintiff,	)	CIV 91-452
	)	PHX CAM
	)	
v.	)	April 19, 1991
	)	Phoenix, Arizona
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	
	)	

MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE CARL A. MUECKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	William C. Blankstyn In Propria Persona 16213 South 35th Street Phoenix, Arizona 85044
For the Defendant:	United States Attorney By: Richard G. Patrick 230 North First Avenue Phoenix, Arizona 85025
Court Reporter:	Jean M. Moll, RPR 230 North First Avenue Phoenix, Arizona 85025

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does not go to my address, it can go to [1] anybody's address on the odd side.

THE COURT: Well, I know they don't have a Zip Code for every individual in the United States. That's absurd. They have a Zip Code for an area. I don't understand your point.

I don't think anybody would ever contend that everybody has an individual Zip Code. The Zip Code is to give the postman an idea of what area in the country and what area within that state and what area within that community that mail is supposed to go to.

MR. BLANKSTYN: I just wanted to establish a foundation that the Zip plus 4 number does not go to my particular address. It could go to any --

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1 Page numbering at top of page is the same page numbering found in original transcript by Court Reporter Jean M. Moll.

THE COURT: This is true of everybody. Go ahead. But then they have the address which goes to your address.

MR. BLANKSTYN: I also have a letter, because I made a telephone inquiry to the Claims Department of the Postal Service, that not only shows that the 1985 deficiency with the certified number that ends in 456 went back unclaimed, but that the one which was the '86 deficiency, the one that I picked up and did receive and is now in Tax Court, also went back unclaimed. So the Post Office really has no idea of where this mail went, what happened to it. It was mishandled. That's what my contention is.